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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-901

KATHRYN BURNS, *et al.*; J. W. STEPHENSON WISE, JR., *et al.*; BARBARA AIKEN, *et al.*; VOTER EDUCATION PROJECT, INC.; YOUTH CITIZENSHIP FUND, INC.; THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA; THE LEAGUE OF WOMEN VOTERS OF GEORGIA; COMMON CAUSE, INC.,

Appellants,

v.

BEN FORTSON, Individually and in his capacity as Secretary of State of Georgia; JIMMY CARTER, Individually and in his capacity as Governor of Georgia; JOSEPH HONSTEIN, Individually and in his capacity as Registrar of Fulton County, Georgia,

Appellees.

On Appeal From The United States District Court For The Northern District Of Georgia

JURISDICTIONAL STATEMENT

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BEN FORTSON, Individually and in his capacity as Secretary of State of Georgia; JIMMY CARTER, Individually and in his capacity as Governor of Georgia; JOSEPH HONSTEIN, Individually and in his capacity as Registrar of Fulton County, Georgia,

Appellees.

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Georgia, dated September 27 and October 12, 1972, are unreported. Copies are appended at 1a and 6a, respectively.

JURISDICTION

This action arose under the fourteenth amendment of the Constitution of the United States and 42 U.S.C. §1983. Jurisdiction was based on 28 U.S.C. §§2201,

et seq., 2281 and 2284. The individual plaintiffs[1] sued as representatives of a class of all others similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure.

Plaintiffs requested a declaration that Georgia Code §§34-602 and 34-611 infringe upon the right to vote and deny certain individuals equal protection of the laws insofar as they provide that all eligible individuals may register to vote until 14 days prior to the November general election, but only those who register 50 days prior to the election may vote for all contested offices, national, state, and local. Plaintiffs also requested injunctive relief against the enforcement of the Georgia Code provisions.

A statutory three-judge court was convened which, by order dated September 27, 1972, denied all relief sought by plaintiffs. On October 12, 1972, the court denied plaintiffs' Motion for New Or Additional Hearing and Amendment of Order filed on October 6, 1972. In issuing the denial, the court amended its original order. Plaintiffs appealed from the orders of September 27 and October 12, 1972, by Notice of Appeal filed in the United States District Court for the Northern District of Georgia on October 19, 1972. A copy is attached at 9a.

The jurisdiction of this Court to review the orders by direct appeal is conferred by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of this Court to review the orders on direct appeal: *Ferguson v. Williams*, 405 U.S. ____, 92 S.Ct. 1322 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972).

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[1] Appellants were plaintiffs in the court below and will be referred to herein as plaintiffs; appellees were defendants below and will be referred to herein as defendants.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment of the Constitution of the United States provides in pertinent part that a State shall not

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Georgia Code §34-602 provides, in pertinent part:

> *Elector's qualifications; applicants acquiring age and residence qualifications within six months permitted to register; electors not required to reregister.* —No persons shall vote in any primary or election held in this State unless he shall be: (a) registered as an elector in the manner prescribed by law; (b) a citizen of this State and of the United States; (c) at least eighteen years of age; (d) a resident of this State at least one year next preceding the date of such primary or election, and of the county in which he seeks to vote at least six months next preceding the date of such primary or election; and (e) possessed of all other qualifications prescribed by law. Any person who possesses the qualifications of an elector except those concerning age or residence or both, shall be permitted to register to vote if such person will acquire such qualifications within six months after the day of registration, provided, however, that such person shall not be permitted to vote in a primary or election until the acquisition of such qualifications. Notwithstanding any other provision of this Chapter, any person who was qualified and registered to vote at the time of the adoption of this

Code shall not be required to reregister under the terms of this Chapter unless such person shall have become or becomes disqualified to vote, by reason of having been purged from the list of electors or for any other reason whatsoever, in which event, such person shall, in order to become registered to vote, reregister under the terms of this Chapter.

Notwithstanding any other provision of this Section;

(1) Where a person establishes residence in any county in this State and registers at least fourteen days prior to the primary to nominate candidates for or the general election for presidential and vice-presidential electors, and such person would have been entitled to vote for such candidates or electors except for the residence requirements contained in (d) above, and such person is not entitled to vote for such electors in any other jurisdiction, such person shall be eligible to register and vote for presidential and vice-presidential candidates or electors in such primary or election or both.

(2) Where a person moves from one county in this State into another county in this State and registers at least fourteen days prior to the primary or election to nominate or elect candidates for the office of governor or the office of lieutenant governor, and such a person would have been entitled to vote for such persons except for the county residence requirements contained in (d) above, and such person is not entitled to vote for such persons in any other county, then such person shall be eligible to register and vote in such primary or general election or both.

but only for the abovementioned candidates for nomination or for public office.

(3) Where a resident of this State has not registered to vote in this State, and such person would have been entitled to vote if he had registered in this State, then such person shall be eligible to register and vote in any primary to nominate candidates for or the general election for presidential and vice-presidential electors if such person registers at least fourteen days prior to the primary or election.

The residence requirements of §34-602(d) were held unconstitutional in *Abbott v. Carter*, C.A. No. 15689 (N.D. Ga. April 11, 1972). A copy of the court's opinion is attached hereto at 11a.

Georgia Code §34-611 provides:

Applications for registration; fifty day registration deadline for November election.—The registrars shall, in each year in which there is a November election, cease their operations of taking applications from persons desiring to vote in such election at the close of their business on the fiftieth day prior to such election except where this Code prescribes a different deadline. During the period while the November election list is being prepared, they may suspend the operation of taking applications from those desiring to vote in subsequent primaries and elections, provided the main office shall be kept open at least one day and the same day in each week during this period for receiving applications. The registrars may also suspend the operation of taking applications on any day in which a primary or election is held.

Rule 59(a)(2) of the Federal Rules of Civil Procedure provides that:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

QUESTIONS PRESENTED

I. Whether the district court applied the wrong standard of proof in upholding the constitutionality of Georgia Code §§34-611 and 34-602, which determine a registered voter's right to participate fully in the general election solely on the basis of the date of that voter's registration.

II. Whether, if the district court applied the correct standard, it nonetheless erred in holding that the State had demonstrated a compelling state interest justifying the classification embodied in Georgia Code §§34-602 and 34-611.

III. Whether it is a denial of due process and an abuse of discretion for a court to refuse to give plaintiffs an opportunity to present additional testimony, requested by motion made after trial pursuant to Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure, when: (a) the burden of proof was unexpectedly imposed on plaintiffs after the evidentiary hearing was completed; (b) the exercise of fundamental voting rights was at issue; (c) affidavits and other documents attached to plaintiffs' motion showed a strong likelihood that the court's opinion was based on errors of fact; and (d) no prejudice would have resulted to defendants.

STATEMENT OF THE CASE

There are no durational residency restrictions for eligibility to register and vote in local, state, and national elections in Georgia.[2] Not all registered voters, however, are

[2] On April 11, 1972, a three-judge court, relying on Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995 (1972), ruled that Ga. Code §34-602(d) was unconstitutional insofar as it provided that no person could vote in any primary or general election in Georgia unless he had been "a resident of this State (footnote continues on next page)

allowed to vote in all November elections. Georgia law divides registered voters into two classes: those registered more than 50 days prior to a general election, and those registered less than 50 but more than 14 days prior to a general election. A voter's right to participate fully in the general election which next follows the date of his registration is determined solely on the basis of which class he falls into.

The distinction in treatment grows out of two provisions of Georgia law. Georgia Code §34-611 provides generally that registrations for an upcoming November election shall cease on the fiftieth day prior to an election, "except where this Code prescribes a different deadline." A different deadline is prescribed in §34-602. That section provides that all eligible persons may register up to fourteen days prior to the general election, but that, having registered under §34-602, they may vote only for presidential and vice-presidential electors.[3] In 1972, the registration 50-day deadline was set on September 18.

On or about September 20, 1972, plaintiff Burns established residence in Atlanta, Georgia, and registered to vote in Fulton County. She was told that she would be allowed to vote only in the presidential election, and then only by going to the county courthouse, rather than her election district, to vote. Plaintiff Wise has been a resident of Fulton County, Georgia, since August, 1968, but did not register until September 19, 1972. He was told

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(footnote continued from preceding page)

at least one year next preceding the date of such primary or election, and of the county in which he seeks to vote at least six weeks next preceding the date of such primary or election." See Abbott v. Carter, at 11a, *infra*.

[3] The statute also provides that persons who move from one county into another and register 14 days prior to the election may vote for governor and lieutenant governor only.

by the registrar's office that he could vote only in the presidential election, and then only by going to the county courthouse, rather than his election district, to vote.

The complaint in this action was filed at approximately 4:30 p.m. on September 21, 1972. A temporary restraining order was requested for the purpose of ensuring that registration efforts of the registrar's office would not be limited in the period falling between 50 and 14 days prior to the election;[4] injunctive and declaratory relief was requested against the enforcement of the statutory classification which abridged fundamental rights solely on the basis of time of registration. The next day a full hearing on the merits of all issues was held before a three-judge court.

The registrar from Fulton County, a former registrar from DeKalb County, and an employee of the office of the Secretary of State testified at the hearing on behalf of defendants. Defendants did not contend that it is impossible to register all applicants who appear at the registrar's office up to 14 days preceding the election. Testimony revealed:

> (1) Registration of all applicants would continue, along with applications for absentee ballots, up to 14 days before the election (T. 6, 90-91).[5]
>
> (2) There is no difference in registration procedure for people who register 50 days, and those who register between 14 and 50 days, prior to the election, except that in dealing with the latter group

[4] The original complaint sought to enjoin the registrar's office from discontinuing the use of deputy registrars after September 18, 1972. That issue is not a subject of this appeal.

[5] Testimony is cited by reference to the page number of the Transcript of the September 22 hearing as "T. _____."

one additional card is perhaps filled out (T. 100-101),[6] and voters in that group are not told what election district they will vote in (T. 50).[7]

(3) The addresses of voters in both groups are ascertained at the time of registration (T. 56, 64-65). The address determines the voter's election district and what ballot he gets (T. 64).

(4) When a registrant gives his address, a registrar can then tell what election district the registrant is in (T. 64-65), although in some cases a trip to the planning board may be required to look at census maps (T. 39, 65).

Both the Fulton County registrar and the former DeKalb County registrar concluded that it was necessary to have a 50-day registration deadline for some, but not all, elections.[8]

On September 27, 1972, the three-judge court denied the relief requested by plaintiffs, stating that the 50-day

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[6] The additional card is for later mailing notification to the voter of his election district (T. 100).

[7] All persons who register after the 50-day deadline must go to the county courthouse to vote regardless of what election district they are in.

[8] The Fulton County registrar stated that the 50-day period could be reduced simply by getting more help and more typewriters (T. 99).

On direct examination, the former DeKalb County registrar stated that six months would be an ideal period. He later testified that getting registration completed in less time was simply a clerical problem which could be cured if there were more clerks with "technical knowledge" which, according to the witness, takes about a year to acquire. The technical knowledge consists of "where to find the address, they have to know and see where they vote, if they don't find out, they have to know where to go to the planning board and get their ruling on it." (T. 58-61). The DeKalb County registrar, who was the state's "expert" witness, also testified that there was something "dangerous" about deputy registrars (which he did not use when he was registrar) (T. 59) and that a penalty should be placed on persons who are registered but do not vote (T. 55-56).

period was reasonable (Opinion, at 2a n. 2) and that plaintiffs had not "demonstrated that, given the requirements of the Georgia election law, 50 days for administrative compliance therewith is excessive or unreasonable." (Opinion at 5a). In addition, the court stated that

> At the most, the court would have to guess what few days, if any, could be reasonably deducted from the 50-day period. This we cannot do. All the evidence before the court indicates that the 50-day period is reasonable. As that is the issue in the case, the petition is denied. Opinion at 4a.

On October 6, plaintiffs filed a Motion for New or Additional Hearing and for Amendment of Order under Rules 59(a) and 60(b), Federal Rules of Civil Procedure.[9] The motion pointed out that (1) the court had, after trial, allocated the burden of proof to plaintiffs, in spite of the language of this Court in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), plaintiffs having justifiedly proceeded under the belief that defendants had the burden of proof, (2) the court's judgment was based on a mistake of fact which, in the area of fundamental voting rights, should be corrected so as to prevent a miscarriage of justice; and (3) defendants would not be prejudiced if the previous order were amended to deny only preliminary relief and additional testimony were heard, while plaintiffs' fundamental right to vote was at stake. Attached to the motion were a letter from the Fulton County registrar stating that 30 days was all he needed to prepare voting lists, letters from numerous Georgia registrars stating that as few as 5, 7, 8, or 15 days were needed to compile voting lists, and an affidavit

[9] The Motion was timely filed, within 10 days under Rule 59(e) and within a reasonable time under Rule 60(b).

showing that, were the motion granted, the present DeKalb County registrar would testify that a single, 14-day voter registration deadline was all that was necessary and that use of a single deadline would simplify rather than complicate his duties.

On October 12, the court issued an order denying the motion. The court stated that the motion was not warranted on "newly discovered evidence" principles,[10] and avoided the issue of burden of proof by adding to its original order:

> Stated differently, if the burden of proof is originally upon the state, as contended by plaintiffs, that burden was met by the evidence produced which was the only evidence before the court. It demonstrated that the 50-day period is necessary to promote a compelling state interest, namely the orderly, accurate, and efficient administration of state and local elections, free from fraud. (Opinion at 7a-8a).

A footnote to the word "necessary" read:

> On the whole, the evidence showed a reasonable effort by the registrars in completing their tasks within the 50 days. Perhaps some more effort could reduce the twenty day period claimed to be excessive. However, as stated, we cannot "guess" any such period. We are bound by the evidence, timely presented. In this context, we are unable to state what lesser period, if any, is ample for such process. (Opinion at 8a, footnote 1).

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[10] Plaintiffs did not contend that the evidence was newly discovered but merely that it existed, could be introduced to enable plaintiffs to show the unreasonableness of the 50-day period, and showed that the Court's opinion was based on an error of fact.

A motion for injunction pending appeal, filed October 19, 1972, along with a Notice of Appeal to this Court, was denied on November 13, 1972.

THE QUESTIONS ARE SUBSTANTIAL

I. Georgia law allows one class of registered voters to vote for all candidates in the November elections, but permits a second class of registered voters to vote for only a limited few. The district court did not require the State to show that this classification was necessary to the protection of a compelling state interest.

> [I]f a challenged statute grants the right to vote to some citizens and denies the franchise to others, "the court must determine whether the exclusions are *necessary* to promote a *compelling state interest.*" *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (emphasis in original).[11]

The trial court did not use the standard prescribed by this Court in permitting the State to abridge rights of a significant class of voters without requiring it to demonstrate that the abridgement was mandated by a compelling state interest. The September 27 opinion of the trial court stated that the test by which the constitutionality of the 50-day registration deadline is to be judged is:

> whether the particular period is *reasonable or unreasonable* for the administrative processes of registration and voting. . . . Opinion at 2a, note 2 (emphasis added).

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[11] *See also* Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Evans v. Cornman, 398 U.S. 419 (1970); City of Phoenix v. Kalodziejski, 399 U.S. 204 (1970).

The court concluded:

> All the evidence before the court indicates that the 50-day period is reasonable. *As that is the issue in the case,* the petition is denied. Opinion at 5a (emphasis added).

In addition, the court held that the defendant's witnesses "substantiate the need for a 50-day registration cut-off point," Opinion at 3a, and

> [m]ore importantly, the *plaintiffs have not demonstrated* that, given the requirements of the Georgia election law, 50 days for administrative compliance therewith is excessive or unreasonable. Opinion at 4a (emphasis added).

The court's opinion was grounded on the incorrect premise that a "reasonableness" test is the proper standard by which the constitutionality of a statute restricting voting is judged and that plaintiffs have the burden of showing unreasonableness.

This point was argued in plaintiffs' motion for a rehearing. The court thereupon amended its order to state the following:

> Stated differently, if the burden of proof is originally upon the state, as contended by plaintiffs, that burden was met by the evidence produced which was the only evidence before the court. It demonstrates that the 50-day period is necessary to promote a compelling state interest namely the orderly, accurate, and efficient administration of state and local elections, free from fraud. Opinion at 7a-8a. (footnote omitted)

By this language, the court purported to elevate its prior finding that the plaintiffs had failed to prove that the

State's action was unreasonable into a new holding that the State had demonstrated that discrimination against the plaintiffs and the class of voters they represent is necessary to the protection of a compelling state interest.[12]

The court's revision is insufficient for two reasons. An opinion, based on an assumption that the issue is the "reasonableness" of the State's action, and that the burden of proof is the plaintiffs', and which analyzes evidence in light of these premises, cannot be purged merely by an *ex post facto* insertion of a magic formula. Second, the court's "corrected" formulation of the standard of proof embodies the same faulty premise as the original version. By footnote, the court indicates that the "necessary" element of the "compelling state interest" test has been met when the State shows it has not been "niggardly" in the size of the staffs and other facilities it provides. In this case, the court concluded the State's efforts were "reasonable." Such an approach is fatally defective because it permits a state to abridge fundamental constitutional rights simply by demonstrating that its efforts to carry out the mandate of the Constitution have been "reason-

[12] The Court's confusion at the hearing on the proper standard to apply is reflected throughout the transcript. For example, in his opening statement, Mr. Bradley, counsel for plaintiffs, argued that the state must demonstrate not only a rational basis for the discrimination, but a compelling state interest to maintain it. Judge Bell replied, "Let's don't get into that, this is not a race question. Do you think the compelling state interest test runs to everything?" Mr. Bradley replied that the standard did apply in voting cases, citing Kramer v. Union Free School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969), and Dunn v. Blumstein, 405 U.S. 330 (1972) (T. 9). Later, again referring to the burden of proof, Judge Bell stated, "In the Dunn v. Blumstein case, where the Supreme Court didn't say anything about a rational basis or a compelling state interest, they say substantial State interest, this is the first time they have used this terminology I think, maybe, but at any rate, that is the test" (T. 14). This obvious misreading of Supreme Court decisions carried over into the court's two opinions.

able." This, plaintiffs submit, is no different from the "rational basis" test applied by the court in its first order.

This Court has never held that the fundamental right to vote may be dealt away with so cavalierly. *See, e.g., Carrington v. Rash,* 380 U.S. 89, 96 (1965). It should note jurisdiction to correct the clear error of the district court.

II. Even if this Court concludes that the trial court adequately corrected the error in its initial order, the State has failed to demonstrate that the classification which denies voters the right to participate fully in the general election is necessary to the protection of a compelling state interest.

The *only* type of evidence sufficient to sustain the classification is evidence establishing that it is necessary to the protection of a compelling state interest to prevent voters, already registered, from voting in all races. The district court purported to find evidence in two factors: [13]

(1) The requirements on election officials to process the registration of voters registering under the 14 day provision are not as great as the requirements under the 50 day provision; and

(2) The state does not have to determine the election district for voters registered between 50 and 14 days prior to the election, since they vote at a single polling place.

---

[13] The court also mentioned the fact that historically only a small number of voters register under the 14-day provision. Any analysis based on "historical" figures showing the number of voters registering between 14 and 50 days prior to the November election, however, is of little value, because up until 1971 the Election Code permitted only *new*, not all, residents to register until 14 days before an election.

In evaluating these factors, the court noted that "individuals registering under the 14-day provision are kept on separate lists and are not included in the extensive, alphabetized, verified and purged lists by precinct for those voters registering before the 50-day cutoff," and that 14-day registrants were not permitted to vote in their home precincts. Opinion at 4a. No reason exists, however, why the 14-day registrants could not be assigned to vote in their home precinct. At the time of registration, whether under the 50 or the 14 day provision, the voter furnishes the registrar with his address, all the information that is needed to assign him his election district and ballot (T. 64-65).[14] And to state that the 14-day registrants' names are not included on the list sent to precincts is to cite the *fact* of discrimination as the *justification* for that discrimination.[15]

---

[14] See Statement of Case at 11, *supra*. Mr. Thomas testified that his office got "hundreds" of telephone calls a day from voters asking where they were to vote and those voters were presumably accommodated (T. 35). There is no apparent reason why new registrants could not also be told where to vote. Indeed, after the election, the registrars, using no more information than they had before the election, inform the 14 day registrants of their home precincts. The state demonstrated no reason why this could not be done *before* the election.

Defendant Honstein suggested that 14-day registrants could not be assigned their proper precinct because the address information furnished the registrar is sometimes imprecise, for example a postal box number is given instead of a numbered street address (T. 110). The answer to this contention is that if a registrant fails to provide a registrar with the necessary information, he cannot be registered. Ga. Code §34-614. But to predicate the denial of the right to vote to the many based on the failure of the few to furnish proper information is to turn logic on its head. Certainly such lame excuses do not reach the level of a "compelling" state interest.

[15] The state produced no testimony which tended to show any compelling reason why the 14 day registrants cannot be included on the separate polling place lists, and thus allowed to vote for all candidates. As Mr. Thomas, the retired registrar for DeKalb County, testified, an alphabetized list of the

(footnote continues on next page)

Instead of introducing evidence which would tend to show the difficulty of permitting voters, once registered, to vote for all candidates, the defendants introduced testimony which, if believed, might tend to show the difficulties of initially registering these voters. This is *not* an issue in the case.[16] The relief sought—permitting all registered voters to participate fully in the general election—is in no way directed to requiring the State to register more residents.[17]

The thrust of the State's position, as perceived by the

(footnote continued from preceding page)

voters registering under the 14-day provision is prepared and sent to the Secretary of State 5 days prior to the election, along with the master lists of other voters (T. 51). Up to 15 days prior to an election, any voter who has moved from one election district to another may complete a change of address form and vote at his home precinct. Ga. Code §34-631. So that they may include these transfers on the master list, the registrars do not begin making the final copy of the list until after this fifteen day cutoff (T. 90). Moreover, it takes the registrars no more time to complete a change of address form than it does the original registration form (T. 102-04). Thus, because the final version of the list is not prepared until about the time of the 14 day cutoff, and because it is no more difficult to include new voters on the list than it is to include transfers, no reason presents itself why the new registrants could not be included on the master list, as well as the transferred voters, and it appears that the *only* reason the 14 day registrants are not included on the master list is because of the State's decision to segregate them into a separate voting class.

[16] The defendants further obscured the real issue in this case, which is solely whether all registered voters should be able to vote on an equal basis, by introducing evidence to show the general confusion which is inherent in conducting any election in Georgia (T. 37-40).

[17] A spate of lower court cases decided after this Court's decision in Dunn v. Blumstein, *supra*, have required states to continue registering voters until closer to the general election. *See*, Ferguson v. Williams, 343 F. Supp. 654 (N.D. Miss. 1972); Hinnant v. Sebesta, 41 U.S.L.W. (M.D. Fla. Aug. 14, 1972); Bishop v. Lomenzo, 72 Civ. 1088 (E.D.N.Y. Sept. 7, 1972); Lewis v. Marston, Civ. No. 72-481 (D.Ariz. 1972); Young v. Gnoss, ____ Cal. 2d ____, 101 Cal. Rptr. 533, 496 P.2d 445 (1972). The relief sought here—permitting those already registered to participate fully in the election—would seem much less drastic.

court,[18] is that, for administrative convenience, the State desires to keep the number of voters registering between the 50th and the 14th day as small as possible, because a last minute deluge of registrants would be difficult to service. Whatever validity that argument might have disappeared in 1971 when *all* unregistered voters, and not just new residents, were permitted to register between the 50th and the 14th day. When the state legislature, on one hand, determines that there is no reason to limit the class of voters who may be registered during this period, there is no basis, on the other hand, to deny voters, once registered, the right to participate fully in the election. The abridgement of a fundamental right cannot constitutionally be grounded on a fear by the state that, if it were less "niggardly" granted, more voters would take advantage of it. It would be anomalous indeed for this Court to hold that a constitutionally permissible justification for abridging the franchise of one group of registered voters is to discourage other potential, but unregistered, voters from registering and voting.

Moreover, this record fails to establish that a last-minute deluge of registrants would take place[19] or that

[18] *See* T. 14 (Judge Bell: "14 days with a large number of people, it would be difficult to manage, anyone would know that."); T. 66 (Judge Moye: "Isn't there another good reason that the 50 day deadline keeps the people who come in after the 50 days down to a trickle, where it is manageable at a central polling place."); T. 68 (Judge Smith: "I think Judge Moye's comment though was if we did what you all wanted, 50,000 people could be voting up to the 14th day. . .").

[19] The defendants' worry that voters will wait until the last minute to register and that registrars cannot cope with last-minute registrants when given only 14 days to compile voting lists. The state of the evidence on this point is:

(1) Defendants did not show how many people registered to vote in the 14 days preceding the 50-day registration deadline (T. 82). An estimate was

(footnote continues on next page)

administrative accommodation, short of denying one group of registered voters the full use of their franchise, could not deal with whatever problems the State faces.[20] As this Court stated in *Dunn v. Blumstein, supra* at 343:

> . . . if there are other reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

Rather than speculating as to the number of voters who might choose to register if they could participate fully in the general election, the State was under a burden to demonstrate that additional administrative requirements necessary to register a voter to vote in all races are so compelling that, because of them, the State is justified in limiting his participation to the presidential race. The evidence indicates that the *only* additional requirement of substance is to inform the voter of his home precinct. No reason appears why this cannot be done, especially since voters who change their addresses up to 15 days prior to

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(footnote continued from preceding page)

given in Fulton County of 12,000 voters in the last 10 days (T. 96), and 700 on the last day in DeKalb County (T. 55).

(2) Witnesses for defendants did not know how long it took for a clerical worker to complete a registration card (T. 96-97). Five minutes to fill out and type a card was made as an estimate (T. 107-08).

(3) There are between eleven and thirteen permanent clerical workers each in the DeKalb County and Fulton County registrars' offices, and additional volunteers (T. 44, 84, 90).

(4) Registration cards are sent "just about on a daily basis" to the data processing center for key punching (T. 89, 100). The master list of qualified voters in a county and lists broken down into election districts can then be produced by computer the moment the last card is available (T. 43).

[20] See also testimony at note 8, *supra*.

the election are permitted to vote in their home precincts. Ga. Code §34-631.

Since the State has failed to carry its burden, the judgment entered below should be reversed, and a judgment entered for plaintiffs.

III. A party upon whom the burden of proof has been unexpectedly imposed after trial should be given an opportunity to meet that burden by presenting additional evidence. The due process clause of the fourteenth amendment guarantees that opportunity. In addition, in the present situation, it was an abuse of discretion under Rules 59(a) and 60(b), Fed. R. Civ. P., for the court to deny that opportunity.

At the evidentiary hearing plaintiffs justifiedly relied on *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), allocating the burden of proof to the State to justify infringements on the right to vote,[21] and the application of *Dunn* in *Ferguson v. Williams*, 405 U.S. ____, 92 S.Ct. 1322 (1972), which vacated the district court's opinion.[22] Throughout the hearing plaintiffs stressed their reliance on this burden. The district court did not make a specific ruling as to burden of proof at that time. At the conclusion of the hearing, believing that defendants had

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[21] The test of whether restrictions on voting are constitutional is whether they are "*necessary* to protect a *compelling* state interest," Dunn v. Blumstein, *supra*, 92 S. Ct. at 1000, and a "heavy burden of justification is on the State" to show that such restrictions are constitutional under the compelling state interest test, *id.* at 1003.

[22] Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971) (three-judge court). On remand, see Ferguson v. Williams, 343 F. Supp. 654 (N.D. Miss. 1972) (three-judge court).

not met their "heavy burden," plaintiffs chose to introduce no further evidence.

The opinion of the court issued five days later clearly showed that the court felt it was plaintiffs' burden to prove that the 50-day registration deadline was unreasonable.[23]

Plaintiffs then requested an opportunity, under Rules 59(a) and 60(b), Fed. R. Civ. P., to meet the burden of proof imposed on them by presenting additional testimony which would show that the 50-day restriction was unreasonable, and presented affidavits and other documents to the court which indicated that the request was not frivolous. Plaintiffs noted that no prejudice would result to defendants if the court amended its original order to deny only preliminary relief and that, since a fundamental right was involved, the requested action would prevent a miscarriage of justice. The request was denied by the court which superficially adopted the burden of proof set forth in *Dunn v. Blumstein* but reiterated its previous position that plaintiffs were required to show that the 50-day period was unreasonable.[24]

It was a denial of due process to deny plaintiffs' request. The due process clause of the fourteenth amendment of the Constitution of the United States requires that a litigant be given a meaningful opportunity to be heard before he is deprived of a right. A post-trial reversal of a burden of proof under which parties to a suit have proceeded, without granting the party upon whom the new burden of proof is imposed an opportunity to present evidence to meet the burden, denies due process of law.

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[23] See Statement of the Case at 11-12, *supra*.

[24] See p. 15, *supra*.

It has also been held to be an abuse of discretion of a court not to grant a motion for a new hearing under Rule 59(a) Fed. R. Civ. P. in such circumstances. See *Halper v. Browning, King & Co.*, 325 F.2d 645 (D.C. Cir. 1963);[25] *duPont v. United States*, 385 F.2d 780 (3d Cir. 1967).[26]

In addition, Rule 60(b)(6) Fed. R. Civ. P. provides that a court may grant relief from a previous order for any reason "justifying relief from the operation of the judgment." This Court has given a liberal interpretation to Rule 60(b)(6), refused to limit relief under the rule to that authorized under common-law writs such as *coram nobis*, and stated that Rule 60(b)(6)

> vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice. *Klapprott v. United States*, 335 U.S. 601, 614 (1949).[27]

Factors which have been taken into account when a de-

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[25] "Since the case was tried under a misapprehension by the parties as to their respective burdens of proof, the judgment should be opened and additional testimony taken . . . ." Halper v. Browning, King & Co., 325 F. 2d 645 (D.C. Cir. 1963).

[26] "[A]lthough Patterson's evidence had been received as competent, and no motion had been made to strike it, nevertheless, the court dismissed plaintiffs' complaint not because it rejected Patterson's testimony on grounds of credibility, but rather because of a post-trial determination that his valuation was legally defective . . . . Plaintiffs . . . could not have anticipated the subsequent rejection of the evidence on grounds of incompetency. They were thus deprived of the opportunity to supply the deficiency which they would have had if the evidence had been stricken during the course of the trial. In these circumstances therefore, plaintiffs were entitled to an opportunity to offer additional evidence either by further explanation by Patterson or by other witnesses to supply the want of evidence which the court had declared existed." duPont v. United States, 385 F. 2d 780, 783-84 (3d Cir. 1967).

[27] See Menier v. United States, 405 F. 2d 245, 248 (5th Cir. 1968).

cision is made as to whether relief under Rule 60(b)(6) should have been granted by a district court include: [28]

(1) Whether the party requesting relief is attempting to substitute relief under Rule 60(b)(6) for a proper and timely appeal, in which case relief will be denied, *Ackerman v. United States,* 340 U.S. 193 (1950);

(2) The nature of the litigation and whether it affects a significant public interest, *Bros Incorporated v. W. E. Grace Manufacturing Co.,* 320 F.2d 594, 609 (5th Cir. 1963);

(3) The timing of the request and whether interests of third or participating parties will be prejudiced, *id.,* at 610;

(4) Whether the party requesting relief was given a fair hearing, *Klapprott v. United States, supra,* 335 U.S. at 615; and

(5) Whether the general policy favoring finality of judgments is outweighed by all other considerations, such as preventing the judgment from being a "vehicle of injustice." *Brennan v. Midwestern United Life Insurance Co.,* 450 F.2d 999, 1003 (7th Cir. 1971).[29]

Taking these factors into consideration it was an abuse of discretion for the court not to grant the motion.

(1) Plaintiffs were not using the motion as a substitute for an appeal, but were simply attempting to get relief prior to the November election by taking the position that, since the court had denied relief because of plaintiffs'

[28] *See generally* 7 Moore's Federal Practice, p. 223 *et seq.*

[29] *See also,* Smith v. Jackson Tool & Die, Inc., 426 F. 2d 5, 8 (5th Cir. 1970); Bros Incorporated v. W. E. Grace Manufacturing Co., 320 F. 2d 594, 600 (5th Cir. 1963); and United States v. Gould, 301 F. 2d 353 (5th Cir. 1962).

failure to meet an unexpected burden of proof, plaintiffs were willing to proceed under that burden if given a chance. The plaintiffs did not relinquish their right to appeal from the error of law embodied in the September 27 order. They merely felt that, in order to ensure that voting rights in the upcoming November election would not be sacrificed, they should demand an opportunity to meet the burden of proof imposed on them by the court.

(2) At stake in the litigation was the right "preservative of all other rights," *Reynolds v. Sims*, 377 U.S. 533 (1964), which the courts have always been careful of protecting.

(3) The request was made within a reasonable time, well before the 14-day registration deadline expired. Registration of all applicants would continue until that deadline regardless of any action taken by the court, so defendants would not have been prejudiced.

(4) The burden of proof had been unexpectedly shifted to plaintiffs after trial and plaintiffs had no opportunity to present evidence to meet that burden.

(5) The reasons which generally invoke the policy favoring finality of judgments were not present.

For these reasons, it was an abuse of discretion and a denial of due process for the court not to grant plaintiffs' Motion. If, after additional hearing, the court determined either that plaintiffs had failed to meet their burden or that there were equitable considerations which precluded the court from granting relief for the upcoming election, the court would have then been entitled to deny relief for the immediate or all elections.[30]

[30] *Cf.* Bros Incorporated v. W. E. Grace Manufacturing Co., *supra*, 320 F. 2d at 610-611; Gould v. United States, *supra*, 301 F. 2d at 357.

CONCLUSION

For the above-stated reasons, plaintiffs respectfully request the Court to accept jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed September 27, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KATHRYN BURNS, et al,
Plaintiffs,

vs.

BEN FORTSON, Individually and in his capacity as Secretary of State of Georgia, et al,
Defendants.

CIVIL ACTION NO. 17179

Plaintiffs have brought suit pursuant to the provisions of 42 U.S.C. §1983, 28 U.S.C. §2201 *et seq.* and 28 U.S.C. §§2281 and 2284 challenging the constitutionality of the Election Law of the State of Georgia; specifically Ga. Code Ann. §§34-602 and 34-611. Declaratory and injunctive relief is sought. A three-judge panel was convened to hear the case.

The gravamen of plaintiff's case is that the requirement of Ga. Code Ann. §34-611 which mandates that voter registration be terminated 50 days prior to the general election when juxtaposed with Ga. Code Ann. §34-602 which allows registration for certain elected offices in a general election 14 days prior to said election constitutes an unlawful abridgment of the franchise in violation of the first, fourteenth, fifteenth and twenty-sixth amendments to the United States Constitution. Plaintiffs

contend that the 50-day registration cut-off provision and the creation of two classes (e.g., those who may register 50 days and those who may register 14 days prior to the election or primary) fail to advance any substantial state interest and are unconstitutional.[1]

Plaintiffs, relying on the language in *Dunn v. Blumstein* ____ U.S. ____, 31 L.Ed.2d 274, 288 (1972), that, "30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud . . .",[2] assert that Georgia's 50-day registration termination provision is excessive and unjustified by any substantial state interest. Plaintiffs suggest that, since the legislature of Georgia has established a 14-day registration termination provision in Ga. Code Ann. §34-602, the 14-day limitation be declared the proper deadline. However, substantial differences exist in the magnitude of the group of applicants that may register and vote pursuant to Ga. Code §34-602 and Ga. Code §34-611.

In order to comply with the Federal Voting Rights Act of 1970 which prohibited the States from cutting off registration more than 30 days prior to presidential elections, the Georgia legislature in its 1971 Extraordinary Session revised the former Ga. Code Ann. §34-602. That section, as revised, provides that all qualified citizens in

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[1]This court has heretofore struck all residence requirements in the Georgia Election Code. See *C. Michael Abbott v. Jimmy Carter, et al,* (No. 15,689 (three-judge) N.D.Ga. April 11, 1972).

[2]In the court's view, *Dunn* does not stand for a 30-day maximum limitation as a matter of law. To the contrary, the test is whether the particular period is reasonable or unreasonable for the administrative processes of registration and voting and depends on the facts of each case. *Dunn v. Blumstein,* ____ U.S. ____, 31 L.Ed.2d 274, 295 (1972) (J. Blackmun concurring).

Georgia in order to vote for presidential and vice-presidential electors may register to vote in such elections 14 days prior to election day. Applicants registered under the provisions of Ga. Code Ann. §34-602 must vote at a designated place on election day (usually the county courthouse) and may vote *only* for the presidential or vice-presidential electors. This group is significantly smaller than the group of applicants who register under Ga. Code Ann. §34-611.[3] Under Ga. Code Ann. §34-611 the applicants who register before the 50-day cut-off vote for an entire slate of candidates and vote at their respective precincts.

Testimony from defendants' witnesses[4] substantiate the need for a 50-day registration cut-off point, given the vagaries and numerous requirements of the Georgia election laws. It is their general consensus of opinion, substantiated by the weight and substance of the testimony, that the 50-day cutoff provision allowed the minimum time required to complete the extensive administrative task involved in complying with the provisions of the

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[3]Evidence elicited during the course of the hearing on September 22, 1972 before the panel indicated that in the general election of 1968 in Georgia only 3,260 voters registered pursuant to the 14-day provision voted out of a total of 1,246,891 registered ballots. In the gubernatorial elections of 1970 the following figures were available from Georgia's two largest counties: 1,100 registered to vote pursuant to the 14-day provision in DeKalb County out of a total of 200,000 registered to vote; 700 registered to vote pursuant to the 14-day provision in Fulton County out of a total of 275,000 registered to vote.

In this scheme of things, the court is persuaded that the 14-day group can be processed in that period of time only because it is of minuscule size compared to the whole.

[4]The former registrar for DeKalb County, Georgia, (recently retired after 30 years service), the present assistant registrar of Fulton County, Georgia, and the individual responsible for voter registration in the Georgia Secretary of State's office testified. This was the only evidence before the court.

Georgia election law. The witnesses all indicated that those State administrative offices, reasonably staffed, charged with such requirements as preparation of voter lists, ballot preparation, and voter authentication, worked full time including Saturdays and sometime Sundays during the 50-day period preceding elections in order to meet the obligations established by the Georgia election law within the time allotted. The plaintiffs did not attempt to demonstrate that the other existing requirements under the Georgia election law which compel the extensive and time-consuming administrative actions mentioned hereinabove are unconstitutional and they do not appear to be so on their face. More importantly, the plaintiffs have not demonstrated that, given the requirements of the Georgia election law, 50 days for administrative compliance therewith is excessive or unreasonable.

Plaintiffs' argument that since one class of voters are registered 14 days prior to election day and allowed to vote thereon all voters should be similarly allowed to register is without merit. As indicated above, historically the group registering 14 days prior to election day is significantly (a fraction of a percent) smaller than the group who register 50 days prior to election day. Moreover, as indicated by the testimony, the problems attendant to complying with the applicable requirements of the Georgia election law are not as great or prohibitive under the 14-day provision. Individuals registering under the 14-day provision are kept on separate lists and are not included on the extensive, alphabetized, verified and purged lists by precinct that must be prepared for those voters registering before the 50-day cut-off. Those registering under the 14-day provision only vote for the presidential and vice-presidential electors at a single designated place thus

avoiding the problems of verifying precinct residence and including these individuals' names on precinct and master lists and determining which ballot they are to vote after determining from their address their appropriate ballot.[5]

At the most, the court would have to guess what few days, if any, could be reasonably deducted from the 50-day period. This we cannot do. All the evidence before the court indicates that the 50-day period is reasonable. As that is the issue in the case, the petition is denied.

IT IS SO ORDERED.

This the 27th day of September, 1972.

/s/ GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.
Sidney O. Smith, Jr.
United States District Judge

/s/ CHARLES A. MOYE, JR.
Charles A. Moye, Jr.
United States District Judge

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[5]The testimony at the hearing indicates that depending on a registrant's address he, in some instances, may vote on one of five possible ballots at any one given precinct within a particular county. This occurs because of the constant process of reapportionment under Federal law. *Baker v. Carr*, 369 U.S. 186 (1962). Thus, in a single county (and Georgia has 159) there are different boundaries for federal, state, and county offices which bisect a single voting precinct (and Georgia has approximately 2,100 precincts).

[Filed October 12, 1972]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KATHRYN BURNS, et al,
Plaintiffs,

vs.

BEN FORTSON, Individually and in his capacity as Secretary of State of Georgia, et al,
Defendants.

CIVIL ACTION NO. 17179

In this case the court, after an expedited hearing at the request of plaintiffs on September 22, 1972, ruled that the present Georgia laws setting the periods for voter registration were not unconstitutional. On October 6, 1972, plaintiffs have moved (a) for a new hearing and (b) for amendment of the court's prior order.

The thrust of the request for a new trial is that, if given another opportunity, the plaintiffs believe they could demonstrate that the 50-day period is excessive, or refute defendant's evidence to the contrary. To that end they attach affidavits, correspondence, and the like which go to the impeachment of the witnesses produced at trial. In essence, the motion is an attempt to retry the case on the basis of evidence, much of which has been obtained and assimilated since the first hearing. This request is denied. It is axiomatic that "to warrant a new trial the evidence

must not have been known to the movant at the time of trial; and moreover the movant must have been excusably ignorant of the facts, i.e. the evidence must be such that it was not discoverable by diligent search. A party who has failed to valuate evidence properly and thereby failed to submit it at the trial—will not be granted a new trial.—Evidence, therefore,—whose only effect is to contradict or attack the credibility of witnesses will ordinarily not warrant a new trial, in the absence of very unusual or extraordinary circumstances." 6A Moore, Federal Practice, §59.08[3]. E.g. *Brown v. Schwartz*, 164 F.2d 151 (5th Cir. 1947); *Davis v. Yellow Cab Company*, 220 F.2d 790 (5th Cir. 1955); *Baruch v. Beech AirCraft Corp.*, 172 F.2d 445 (10th Cir. 1949); *Marshall's U.S. Auto Supply v. Cashman*, 111 F.2d 140 (10th Cir. 1940). Tested by the above, the instant motion must fail. This suit was brought by plaintiffs who had far greater time to prepare for trial. Indeed, defendants were given less than 24 hours to do so.

The remainder of the motion regards the terminology used by the court in the opinion. It is insisted that the phrases used are inconsistent with the holding in *Dunn v. Blumstein*, ____ U. S. ____, 92 S.Ct. 995 (1972). From a rereading of the first opinion, it is fairly obvious to the court what was intended irrespective of the terms used. However, in order to obviate any uncertainty, the prior opinion of the court is amended by adding thereto the following as the second paragraph on page four:

> "Stated differently, if the burden of proof is originally upon the state, as contended by plaintiffs, that burden was met by the evidence produced which was the only evidence before the court. It demonstrates

that the 50-day period is necessary[1] to promote a compelling state interest, namely the orderly, accurate, and efficient administration of state and local elections, free from fraud."

Except as stated herein, the motion is denied.

IT IS SO ORDERED.

This the 12th day of October, 1972.

/s/ GRIFFIN B. BELL
Griffin B. Bell
United States Circuit Judge

/s/ SIDNEY O. SMITH, JR.
Sidney O. Smith, Jr.
United States District Judge

/s/ CHARLES A. MOYE, JR. (by G. B. B.)
Charles A. Moye, Jr.
United States District Judge

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[1]As was indicated at the hearing, undoubtedly the 50-day period would not be needed in the smaller counties of Georgia. However, it would be impractical to set a different schedule for Georgia's 159 separate counties. Likewise, the application of manpower, machines, and business techniques in increasing amounts should ordinarily reduce the time needed, even in the larger counties. The testimony regarding the size of permanent, temporary, and volunteer staffs and other facilities afforded in the critical larger counties did not indicate a niggardly approach by the state in this regard. It was in this context that the court adopted the use of the word "reasonable." It is not believed that the state is required to expend inordinate sums to accommodate a few citizens who are laggard in their efforts to exercise the franchise. On the whole, the evidence showed a reasonable effort by the registrars in completing their tasks within the 50 days. Perhaps some more effort could reduce the twenty day period claimed to be excessive. However as stated, we cannot "guess" any such period. We are bound by the evidence, timely presented. In this context, we are unable to state what lesser period, if any, is ample for such processes.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANA DIVISION

KATHRYN BURNS, *et al.;* J. W. STEPHENSON WISE, JR., *et al.;* BARBARA AIKEN, *et al.;* VOTER EDUCATION PROJECT, INC; THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA; THE LEAGUE OF WOMEN VOTERS OF GEORGIA; COMMON CAUSE, INC.,

Plaintiffs,

v.

BEN FORTSON, Individually and in his capacity as Secretary of State of Georgia; JIMMY CARTER, Individually and in his capacity as Governor of Georgia; JOSEPH HONSTEIN, Individually and in his capacity as Registrar of Fulton County, Georgia,

Defendants.

CIVIL ACTION NO. 17179

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs herein appeal to the Supreme Court of the United States from the final order entered in this action on September 27, 1972, as amended by the order of October 11, 1972.

This appeal is taken pursuant to 28 U.S.C. §1253.

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[Filed April 11, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

C. MICHAEL ABBOTT, *Plaintiff,* vs. JIMMY CARTER, Governor of the State of Georgia, et al. *Defendants.*	CIVIL ACTION NO. 15689

ORDER

Plaintiff seeks a declaratory judgment that the State of Georgia's durational residence requirements for voting are violative of the Fourteenth Amendment to the United States Constitution. Georgia has established durational residence requirements of 1 year in the State, 6 months in the county and 90 days in the city. Georgia Constitution, Art. II, Sec. I, Par. III (Ga. Code Ann. §2-703); Ga. Code §§34-602, 34A-501.

On March 21, 1972, the Supreme Court of the United States decided that Tennessee's durational residence requirements of 1 year in the State and 3 months in the county for voting purposes violated the United States Constitution. *Dunn v. Blumstein*, 40 U.S. L.W. 4269 (U.S. March 21, 1972). We have reviewed that decision and can find no reason why its rationale and decision would

not be binding in this case. We therefore decide that Georgia's durational residence requirements are unconstitutional.

However, the Supreme Court did recognize that a state does have the right to close its registration lists at some time prior to the day of election. This closing is not for the purpose of establishing any durational residence requirement, but for administrative purposes such as purging names, preparing election district voters' lists and other similar tasks. The State of Georgia has arrived at certain minimal deadlines it needs to perform these tasks and since the adoption of the Georgia Election Code and Municipal Election Code, these deadlines have been used. Ga. Code §§34-625, 34A-507. Plaintiff does not seek to invalidate these deadlines and this Court does not reach the question of their validity.

The effect of our decision is to invalidate Georgia's durational residence requirements as set out in this opinion and to the extent that Georgia's voter registration laws require oaths as to length of residence, these oaths must be modified to comply with the decision in this case. See Ga. Code §§34-609, 34-631, 34A-505. Georgia may require its voters to be bona fide residents, but it may not require any length of residence as a condition to registering to vote.

This 7 day of April, 1972.

/s/ GRIFFIN B. BELL
U. S. Circuit Judge

/s/ ALBERT J. HENDERSON, JR.
U. S. District Judge

/s/ WILLIAM C. O'KELLEY
U. S. District Judge

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Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-901

KATHRYN BURNS, et al.,
Appellants,

v.

BEN FORTSON, Individually
and in his capacity as
Secretary of State of Georgia; et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

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Supreme Court of the United States

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-901

KATHRYN BURNS, et al.,
Appellants,

v.

BEN FORTSON, Individually
and in his capacity as
Secretary of State of Georgia; et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

Appellees Ben W. Fortson, Jr., Secretary of State of the State of Georgia, and Jimmy Carter, Governor of the State of Georgia, move the Court to affirm the court below on the ground that the question on which the decision rests is so unsubstantial as not to need further argument and that the decision of the court below was correct.

STATEMENT OF THE CASE

The election law of the State of Georgia provides that voter registrars shall, in each year in which there is a November election, cease their operations of registering voters desiring to vote in that election fifty (50) days

prior to that election except that persons may register to vote up to fourteen (14) days prior to the election for the presidential and vice-presidential electors. Ga. Code §§ 34-611 and 602. In 1972, the voter registration books in Georgia closed on September 18 for those persons desiring to register to vote for all offices for which an election was held in November. Anyone who registered after this date but prior to fourteen (14) days before the election could only vote for the presidential and vice-presidential electors.

On September 21, 1972, a group of voters composed of voters registered to vote only in the presidential election, a voluntary voter registrar, and various political and voter groups (hereinafter "voter groups") filed a complaint with the Federal District Court for the Northern District of Georgia. The voter groups were seeking a temporary restraining order and a declaration that the above-described Georgia law was unconstitutional. The defendants, Ben Fortson, Secretary of State of the State of Georgia, and Jimmy Carter, Governor of the State of Georgia, (hereinafter "State") were provided less than one hour's notice of the impending action by the voter groups. The court, aware that time was of the essence, arranged to convene a three judge panel the very next day for the purpose of hearing and deciding the action filed by the voter groups.

At that hearing an opening statement was made by one of the attorneys for the voter groups. (T-5-25). The State then assumed the burden (T-26) and proceeded with its case by introducing evidence in the form of testimony from the registrar of the most populous county in the State, the former registrar of the second most populous county in the State, and the head of the Election Division

in the Secretary of State's Office. At the conclusion of this testimony, the State rested its case. The voter groups proferred no evidence of any kind but rested their case on the oral arguments of their attorneys.

At the conclusion of the final oral argument, the court handed down a decision from the bench denying the relief sought by the voter groups. That decision was reduced to writing in an Order filed September 27, 1972.

The voter groups then filed a Motion for a New Hearing on essentially the following grounds:

(1) The court applied the wrong test to the State law challenged;

(2) Witnesses for the defendants misrepresented the facts; and

(3) The voter groups did not have sufficient time to prepare their case.

In an Order filed October 12, 1972, the court below denied the request for a new hearing essentially because the evidence the voter groups wished to introduce was such that it could have been obtained prior to the original hearing. Since the voter groups had far greater time to prepare for the trial, they should have had the evidence ready to present at the evidentiary hearing on the merits.

The court below further, in the second Order, amended the original Order by providing that the burden of proof had been met by the State and that "the only evidence before the Court . . . demonstrate[d] that the fifty day period [was] necessary to promote a compelling State interest, namely the orderly, accurate and efficient administration of State and local elections, free from fraud." (Jurisdictional Statement, p. 7A).

ARGUMENT

I

THE DECISION OF THE COURT BELOW THAT FIFTY DAYS ARE REQUIRED BY COUNTY VOTER REGISTRAR'S OFFICES TO COMPLETE THE REQUIRED TASKS AND COMPILE AN ACCURATE VOTING LIST IS CORRECT INASMUCH AS IT IS BASED ENTIRELY ON THE EVIDENCE AND TESTIMONY PRESENTED TO THE COURT.

The essence of the voter groups' argument is that if the registrar can register voters up to fourteen days prior to the election to vote for presidential electors, he can register voters up to fourteen days before the election to vote in all elections. In other words, the fifty day cut-off is unnecessary and unconstitutional since the administrative cut off period is not the shortest feasible time. (T-24). Such an argument graphically points out the lack of understanding these voter groups have of the registration process. The testimony before the Court revealed the following facts pertinent to voter registration in Georgia.

Registrars close their books fifty days prior to an election except for those who register to vote only in the presidential election. Upon the closing of the books, registration cards of all the last minute registrants must be compiled. (T-33, 87). This could amount to as many as 7,000 accumulated over a three or four day period. (T-87). Most of these cards are really no more than information sheets and must be retyped to be legible and reflect accurate information. (T-34, 85). At this point

the cards are alphabetized, audited and cross checked against old registration lists to ascertain there are no duplications. (T-34, 89). When all of this is complete, it becomes necessary to determine the election districts in which the registrant is to vote. (T-37, 89). Finally, these cards are sent to the computer center for the keypunch operator to duplicate and the voter lists to be compiled. (T-42, 89). Since the voter list for each election district must be alphabetically arranged, no lists can be prepared until all registration for each applicant is completed. (T-41, 43).

During this time in addition to the above tasks, the registrar's office must prepare absentee ballots, answer numerous telephone inquiries, and change addresses on previously registered electors. (T-36, 89, 90, 91). Also, people can still register to vote in the presidential election only, up to fourteen days prior to the election. The question becomes, "What is different about those who are on the fourteen day list that they can continue to be registered?" There are numerous differences.

Those on the fourteen day list are much fewer in number than those who register just prior to the fifty day deadline. (T-50, 51, Compare T-78 and 96). The other and far more significant difference is that those registrants on the fourteen day list vote only at the court house; there is no need to determine what precinct and what ballot and on what individual voting list their name will appear. (T-50, 100, 101). In a county like DeKalb where there are 114 precincts and approximately 250 different ballots, this is significant. (T-37). That means that over 250 separate voter lists must be compiled, and since the lists are alphabetical, they cannot be printed until the very

last card is in. (T-41, 43). The determination of on which list a voter's name will appear is no easy process since many counties have congressional, state senatorial, school board and county commission districts whose boundaries do not coincide. (T-37). One polling place may have as many as five voting lists. (T-38). As if this were not enough in itself, reapportionment was effected by census tract which used such boundaries as creeks and alleys. (T-39). Consequently, it is necessary to go to the Board of Registrars to determine on exactly which list an elector's name should appear. (T-39, 40). The statement by the attorney for the voter groups that "when [a] man reports you know which ballot is proper for him . . ." is totally unfounded. (T-66).

It is realized that the jurisdictional statement for the voter groups cites testimony which could be erroneously construed to show that the fifty day period is not necessary, and that if fourteen days is sufficient time to process some registrants, it's long enough to process all registrants. However, the court below had before it the entire testimony of the three witnesses and reached a decision based on the cumulative effect of that testimony. (See Jurisdictional Statement, p. 3a).

The testimony clearly reflected that the fifty day cut-off period is necessary to ensure that the voter lists will be out in time for the election. (T-35, 38, 42, 52, 98). It should further be pointed out that the length of time required is not attributable to a lack of effort or diligence on the part of the county registrars. The registrar's offices work nights, Saturdays, and some Sundays during this fifty day period in an effort to get accurate lists to the polls before the election. (T-44, 45, 95). More people

and typewriters are not necessarily the answer. This obviously would reduce the time somewhat, but it's impossible to say how much. (T-99). There is the additional problem of training new personnel, and the fifty days prior to an election is no time to train them. (T-46). Since there was never any evidence presented to indicate how many days this administrative period could be reduced, the court below would not hazard a guess at how many it could be reduced without concrete evidence. (Jurisdictional Statement, p. 5a).

It is clear that the only evidence before the Court established that a fifty day period in which administrative tasks must be performed by voter registrars under the Georgia election law is absolutely necessary. With no other evidence before the court, it is difficult to image what other decision could have been reached.

II

THE BURDEN OF PROOF IN THE HEARING BEFORE THE COURT BELOW WAS ASSUMED AND CARRIED BY THE STATE, AND THE EVIDENCE ESTABLISHED THAT THE LAW PROVIDING A FIFTY DAY PERIOD IN WHICH REGISTRAR'S BOOKS ARE CLOSED TO PREPARE VOTING LISTS FOR THE IMPENDING ELECTION IS NECESSARY TO PROMOTE A COMPELLING STATE INTEREST.

The voter groups' argument pertaining to the test applied to the Georgia law in question and the party upon whom the burden of proof was placed at the hearing is in reality one argument and will be treated accordingly.

It is recognized that this Court has determined that laws that limit the right to vote must satisfy the compelling state interest test. *Dunn v. Blumstein,* 405 U.S. 330 (1972). However, it should also be recognized that only two months earlier in another voting case, this Court stated that laws that have an impact on voting must be closely scrutinized and found reasonably necessary to the accomplishment of legitimate state objectives. *Bullock v. Carter,* 405 U.S. 134 (1972). No doubt the standard applied by the Court in either instance varied little and the burden fell upon the State to justify the restrictions on the franchise. It was simply a matter of different terminology being used. The voter groups blithely refer to the lower court's "*ex post facto* insertion of a magic formula." (Jurisdictional Statement, p. 15). However, the "magic formula" is indeed theirs. To follow their argument in regard to the compelling state interest test, it is only necessary that they establish that the constitutionality of a state law be measured by this standard, and there is nothing that can be shown or proven to meet this test.

The real issue is, "Who has the burden of proof?" It is very clear from the transcript and the court's order that the burden of proof was assumed by the State. (T-26). There was never any question by the State as to whether or not they had the burden of proof. The State assumed the burden of proof, put up witnesses whose testimony carried the burden of proof, and closed the case. (T-26 through T-115). The voter groups chose to put up no evidence at the close of the State's case. (T-116). The heart of the voter groups' complaint is found in the following statement:

> "At the conclusion of the hearing, believing that Defendants had not met their 'heavy burden,' plaintiffs chose to introduce no further evidence." (Jurisdictional Statement, p. 21, 22).

In other words, they made a tactical decision during the hearing which proved to be erroneous. The court below found that the burden of proof was met by the evidence produced in the hearing. (Jurisdictional Statement, p. 7a). The voter groups did not reach the same conclusion as the court in regard to whether the burden of proof was met by the State and that is the crux of their complaint. The burden was originally on the State; the State carried the burden, and it became necessary for the voter groups to refute or overcome the evidence produced at the hearing by the State. This is hardly an unexpected shifting of the burden.

One point should be made in regard to the denial of a new hearing. The voter groups sought a new hearing by presenting affidavits and other documents to the court accompanying a motion for a new hearing. Many of these affidavits and documents had been in the possession of the voter groups for some time. Some of the documents were answers to a questionnaire that was sent out to all the registrars in Georgia by the voter groups. The questionnaires were vague and ambiguous as were many of the answers. However, the point is that when the voter groups filed their case in the Federal District Court after giving the State some thirty minutes' notice, they filed four affidavits, an eight page Complaint, a Motion for Injunction and a Motion for Temporary Restraining Order and an eleven page Brief in Support of that Motion. The Court and the State did everything possible to pre-

pare for a hearing the next day and accommodate these voter groups. The fact that the voter groups did not get all of the evidence before the court, or for that matter any evidence before the court that they wanted to, was no one's fault but their own. They obviously had been working on the case for some time, and they should not be heard to complain that they were unable to present all the evidence in the hearing that might aid in their cause. They had their day in court, and it was a day they chose.

The court below did not apply the wrong test to the Georgia law, nor did it impose an undue burden on the voter groups. The burden of proof was assumed and carried by the State in such a manner as to prove that the fifty day cut-off period is necessary to promote the compelling state interest of an orderly, accurate, and efficient administration of state and local elections free from fraud.

CONCLUSION

The appellees, Secretary of State of the State of Georgia, and Governor of the State of Georgia respectfully submit that the decision of the Court below should be affirmed inasmuch as the appellants present no substantial question for decision by this Court and the decision in the court below was correct.

Respectfully submitted,

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BURNS ET AL. *v.* FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 72-901. Decided March 19, 1973

Closure of voter registration 50 days before November general elections for other than presidential elections, although approaching the outer constitutional limits, cf. *Dunn* v. *Blumstein*, 405 U. S. 330, is permissible to promote the important interest of Georgia in accurate voter lists. *Marston* v. *Lewis*, *ante*, p. 679.

Affirmed.

PER CURIAM.

By statute, Georgia registrars are required to close their voter registration books 50 days prior to November general elections, except for those persons who seek to register to vote for President or Vice President. Ga. Code Ann. §§ 34-611 and 34-602.* The District Court upheld the registration cutoff against appellants' constitutional attack based upon this Court's decision in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). This appeal followed.

The State offered extensive evidence to establish "the need for a 50-day registration cut-off point, given the vagaries and numerous requirements of the Georgia election laws." Plaintiffs introduced no evidence. On the basis of the record before it, the District Court concluded that the State had demonstrated "that the 50-day period is necessary to promote . . . the orderly, accurate, and efficient administration of state and local elections, free

*Section 34-611 was enacted in 1964. At present, Georgia has no independent durational residency requirement. The State's statutory requirement of one year in the State and six months in the county (see Ga. Code Ann. § 34-602) was held unconstitutional in *Abbott* v. *Carter* (No. 15089, ND Ga. 1972).

from fraud." (Footnote omitted.) Although the 50-day registration period approaches the outer constitutional limits in this area, we affirm the judgment of the District Court. What was said today in *Marston* v. *Lewis*, *ante*, p. 679, at 681, is applicable here:

> "In the present case, we are confronted with a recent and amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists. The Constitution is not so rigid that that determination and others like it may not stand."

The judgment of the District Court is

Affirmed.

MR. JUSTICE BLACKMUN, concurring in the result.

I concur only in the result, for I hesitate to join what, for me, is the Court's unnecessary observation that "the 50-day registration period approaches the outer constitutional limits in this area." I also concurred in the result in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), and said,

> "It is, of course, a matter of line drawing, as the Court concedes, *ante*, at 348. But if 30 days pass constitutional muster, what of 35 or 45 or 75? The resolution of these longer measures, less than those today struck down, the Court leaves, I suspect, to the future." *Id.*, at 363.

I am not prepared to intimate at this point that a period of time in excess of 50 days cannot be sustained, no matter how supportive the record may be. In *Blumstein*, the Court struck down Tennessee's 90-day county durational residency requirement in part, I suppose, because it exceeded the State's 30-day registration period. Had the latter been 60 days, rather than 30, I suspect the Court would have indicated approval of a corresponding 60-day

durational residency requirement. See 405 U. S., at 345–349. I feel that each case in this area should be decided on its own record unrestricted by an arbitrary number-of-days figure.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

For the same reasons that I gave in *Marston* v. *Lewis*, *ante*, p. 682, I dissent from the affirmance of the judgment of the District Court. Unlike Arizona, Georgia does not use volunteer deputy registrars, a system that the Court in *Marston* thought created special problems warranting special treatment. Indeed, the State's expert witness in this case testified that there was something dangerous about using deputy registrars. Nor does Georgia have as late a primary as Arizona. As in *Marston*, appellees here did not show that it was impossible to increase the size of the registrars' staffs or the efficiency of their operations. Moreover, there was evidence that final lists of registered voters are not prepared until 14 days before the election, which indicates that there is no serious administrative impediment to keeping registration open for a relatively long period.

The Court also relies on an ingenious bootstrap argument that I cannot let pass without comment. The statutes in question in *Marston* were enacted last year after our decision in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). The Arizona Legislature therefore knew that its limitations on registration could only be justified by the administrative burdens faced by registrars. It knew that insuring the purity of the ballot box and guaranteeing the knowledgeability of voters were not goals that could be permissibly served by time limitations on registration. *Id.*, at 353–357. The Court in *Marston* thus correctly noted that the Arizona statutes reflected a recent judg-

ment that 50 days were necessary to avoid administrative problems.

In this case, the Court quotes that statement from *Marston*. The difficulty is that the Georgia statutes here were adopted nearly a decade ago. The legislative judgment is hardly a recent one. Nor was it made knowing that only administrative difficulties were a justification for durational residency requirements. Even if we would be inclined to defer to a recent and informed legislative determination of necessity, when there is no reason to believe that the legislature made such a determination, deference in that regard is uncalled for.

Finally, I believe it important to indicate my view that the decisions today provide no basis for making it more difficult to register by making shorter any existing registration periods, in the absence of compelling evidence of extraordinary new circumstances. If 30 days were all that some state officials needed yesterday, that is all they need today.